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Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption

Jay Rothrock

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Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption

Cover Page Footnote

24-4

**STRIKING A BALANCE:
THE SPEECH OR DEBATE CLAUSE'S TESTIMONIAL
PRIVILEGE AND POLICING GOVERNMENT CORRUPTION**

*Jay Rothrock**

“Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”

-President Richard M. Nixon, 1972¹

On August 3, 2005, the FBI raided the residences of Representative William Jefferson, finding a stark reminder of the pervasiveness of government corruption—\$90,000 wrapped in aluminum foil and stuffed inside frozen food containers in the congressman's freezer. More remarkable, however, was the FBI's subsequent raid of Representative Jefferson's congressional office, which marked the first time such a warrant had been executed on a sitting congressman.

*The controversial separation of powers issues raised by such a raid are mediated by the Constitution's Speech or Debate Clause, which confers upon members of Congress a testimonial privilege protecting them from any questioning relating to their legislative acts. When the D.C. Circuit addressed the propriety of the FBI's raid on Representative Jefferson's congressional office in *United States v. Rayburn*, the result was a broad interpretation of the Speech or Debate Clause's protection at odds with the Supreme Court's gradual*

* Vinson & Elkins, L.L.P.; J.D., Vanderbilt University Law School, 2008; B.S., Florida State University, 2004. Thanks to Professor Nancy King for her guidance and assistance. The opinions stated here belong solely to the author, and do not necessarily reflect the views of Vinson & Elkins or its clients.

¹ Tim Weiner, *The Cold War Freezer Keeps Historians Out*, N.Y. TIMES, May 23, 1993, at E5.

narrowing of the clause in a string of cases in the 1960s and 1970s.

This Article proposes a narrow conception of the Speech or Debate Clause more consistent with the Supreme Court’s interpretation. More specifically, this Article advances a new understanding of the Speech or Debate Clause in light of a heightened state interest in combating government corruption. This approach would mirror other testimonial privileges based in the Constitution that accommodate superseding prosecutorial interests in light of the specific need for evidence in criminal matters. By drawing procedural elements from the treatment of other Constitutional privileges and implementing investigatory filtering procedures designed to safeguard privileged materials, it is possible to strike a more appropriate balance between legislators’ Speech or Debate Clause rights and the interest in combating government corruption.

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**STRIKING A BALANCE:
THE SPEECH OR DEBATE CLAUSE'S TESTIMONIAL
PRIVILEGE AND POLICING GOVERNMENT CORRUPTION**

INTRODUCTION

With roots reaching back to English law, the Speech or Debate Clause has long been an essential postulate of the doctrine of separation of powers. Stating that “for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place,”² the clause was designed to preserve the independence of the legislature while maintaining the balance of power among the other branches.³

Yet the independence provided by the Speech or Debate Clause has often been abused both inside and outside legislative chambers, as the practice of government corruption has been a constant occurrence throughout our nation's history. Unfortunately for the American people, the trends of dishonesty and fraud among legislators are becoming only more and more widespread. In the past three decades, at least seventeen sitting legislators have been indicted.⁴ Also within recent memory, Representatives Ney and Cun-

² U.S. CONST. art. I, § 6, cl. 1.

³ See *United States v. Brewster*, 408 U.S. 501, 508 (1972) (noting “the Framers’ concern for the independence of the Legislative Branch”).

⁴ See Posting of Paul Kane to Ben Pershing, *Capitol Briefing: Jefferson's Long Odds*, WASHINGTONPOST.COM, http://voices.washingtonpost.com/capitolbriefing/2007/06/jeffersons_long_odds_a_look_at.html (June 21, 2007, 7:36 EST). Senator Ted Stevens was indicted in July 2008 for failing to disclose home renovation services he received from an oil services contractor, adding an eighteenth name to this dubious list. David Johnston & David H. Herszenhorn, *Senator Charged in Scheme to Hide Oil Firm Gifts*, N.Y. TIMES, July 30, 2008, at A1.

ningham each pleaded guilty to felonies before indictments were issued.⁵ Although historical corruption data is difficult to ascertain due to both a lack of data and the perpetrators' significant efforts to avoid detection,⁶ the pervasiveness of current government corruption is well-demonstrated; a recent study shows an average across states of 2.12 federal corruption convictions for every 100 elected public officials.⁷

Perhaps even more bothersome than the increasing incidence of criminal misconduct among legislators is the scope of their misdeeds. In his fifteen years in Congress, Representative Cunningham collected \$2.4 million in bribes.⁸ In 1988, Representative Biaggi was sentenced to eight years in prison after extorting almost "\$2 million from a defense contractor."⁹ Incidents like these surely contribute to recent poll findings that "[s]ixty-five percent of Americans give a negative rating to the ethics and honesty of members of Congress."¹⁰

⁵ *Id.* Representative Ney pleaded guilty to trading political favors for money and gifts, while also admitting to conspiracy and making false statements. *Republican Ney sentenced to jail*, BBCNEWS.COM, Jan. 19, 2007, <http://news.bbc.co.uk/2/hi/americas/6280001.stm> (last visited Aug. 25, 2008); Representative Cunningham pleaded guilty to tax evasion and conspiracy. Seth Hettena, *Former Congressman Gets Eight-Plus Years*, ASSOCIATED PRESS, Mar. 3, 2006, <http://www.comcast.net/news/index.jsp?cat=GENERAL&fn=/2006/03/03/338098.html>.

⁶ See Steven P. Lanza, *The Economics of Ethics: The Cost of Political Corruption*, CONN. CTR. FOR ECON. ANALYSIS 4 (2004), available at <http://ccea.uconn.edu/studies/The%20Economics%20of%20Ethics-%20The%20Cost%20of%20Political%20Corruption.pdf> ("Quantifying political corruption is, however, difficult partly because the perpetrators work so hard to evade detection. But Thomas Schlesinger and Kenneth Meier have argued that the number of federal convictions of public officials for crimes involving corruption is a good proxy for the level of political corruption across states.").

⁷ *Id.*

⁸ Hettena, *supra* note 5.

⁹ *Id.*

¹⁰ Gary Langer, *Poll: Americans Support Searches*, ABC NEWS, June 1, 2006, <http://abcnews.go.com/Politics/PollVault/story?id=2025343&page=1>. The same poll found that only twenty-seven percent of Americans view Congress as "ethical and honest." *Id.*

Moreover, the true economic harm of government corruption has only recently become clear.¹¹ Government corruption leads to an increase in the cost of doing business, raises institutional transaction costs, and hampers economic efficiency.¹² In fact, a recent study found that a single corruption conviction per 100 elected officials has a greater negative impact on job growth than a \$100 increase in per-capita state taxes.¹³ As the economic effects of government corruption become clearer, the case for a revised legal approach to the problem becomes stronger.

Despite this “rich” tradition of corrupt legislators, investigators and prosecutors continue to discover scandals of first impression. Depending on the nature of the scandal, location of relevant information, and whether the legislator is currently in office and in session, investigating a corrupt legislator might take the separation of powers doctrine into uncharted territory. In such cases, it is usually the Speech or Debate Clause that serves as a mediator among the varying interests of the three branches.

The latest scandal to so invoke the clause revolves around Representative William Jefferson, a now tragic figure that represented the promise of America; the son of a grade-school dropout, Representative Jefferson graduated Harvard Law School to become “Louisiana’s first black congressman since Reconstruction.”¹⁴ Rep-

¹¹ See INT’L. INST. OF ADMIN. SCI., THE HISTORY OF CORRUPTION IN CENT. GOV’T. 1 (Seppo Tiihonen ed., 2003) (noting that the study of corruption in large, industrialized nations is a relatively new phenomenon, arising only over the last twenty years).

¹² See Lanza, *supra* note 6, at 2 (summarizing the economic effects of government corruption).

¹³ *Id.* at 6.

¹⁴ Shailagh Murray & Allan Lengel, *The Legal Woes of Rep. Jefferson*, WASH. POST, Feb.

representative Jefferson made a name for himself in Washington as a champion of Third World trade issues, serving on the Ways and Means Committee and co-chairing the African Trade and Investment Caucus, the congressional caucus on Brazil, and the congressional caucus on Nigeria.¹⁵

Either ironically or perhaps expectedly, Representative Jefferson's alleged criminal conduct arose out of the very issues he championed. According to the sixteen count indictment filed June 4, 2007, Representative Jefferson accepted a payment of \$100,000 on July 30, 2005 from an FBI informant whom Jefferson believed was also collaborating to pay-off Nigerian officials.¹⁶ After successfully assisting the informant in pursuing a \$45 million investment in a high-tech firm in Nigeria, Jefferson pressed for compensation from the informant, requesting a five to seven percent ownership share in the company as well as the placement of a family member on the company's payroll to effectuate monthly payments for his benefit.¹⁷

After accepting the informant's \$100,000 payment, the FBI raided Representative Jefferson's Washington and New Orleans homes on August 3, 2005.¹⁸ In surely one of the most vivid images to accompany any congressional misconduct, the FBI discovered \$90,000 wrapped in aluminum foil and stuffed inside frozen food

16, 2006, at A1.

¹⁵ *Id.*

¹⁶ *Congressman Jefferson Indictment Timeline*, ASSOCIATED PRESS, June 4, 2007, <http://www.wwltv.com/topstories/stories/wwl060407tptimeline.16164dca.html> [hereinafter *Timeline*].

¹⁷ Murray & Lengel, *supra* note 14.

¹⁸ *Timeline*, *supra* note 16. Five other locations, consisting mainly of the offices of Representative Jefferson's business associates, were also raided that day in connection with the investigation. Murray & Lengel, *supra* note 14.

containers in the freezer of Representative Jefferson's Washington residence.¹⁹

In early 2006, the suspicion surrounding Representative Jefferson increased when two of his business associates pleaded guilty to crimes involving the congressman. In January, 2006, Brett Pfeffer, a former Jefferson aide and the president of the informant's investment company,²⁰ admitted to allegations of conspiracy as well as aiding and abetting bribery of a public official.²¹ In May 2006, Kentucky businessman Vernon Jackson pled guilty to paying in excess of \$400,000 in bribes to the congressman.²²

On May 20, 2006, the FBI raided the congressional office of Representative Jefferson.²³ It was the first time a warrant had been executed in order to search the congressional office of a sitting congressman.²⁴ Challenging the raid in district court, Representative Jefferson moved for the "return of the property seized during the execution of the search warrant on his congressional office under Rule 41 of the Federal Rules of Criminal Procedure, arguing that the search

¹⁹ *Timeline*, *supra* note 16.

²⁰ Murray & Lengel, *supra* note 14.

²¹ *Timeline*, *supra* note 16.

²² *Id.* Two additional bribery schemes involving Representative Jefferson surfaced in November 2007. In one scheme, Representative Jefferson allegedly asked a lobbyist for a U.S. oil company for \$10,000 per month directed to a family member in exchange for assisting the company in promoting business in Africa. In another, the congressman allegedly lobbied NASA to do business with a U.S. technology company in exchange for payments to Representative Jefferson's family business and a relative. Prosecutors did not file additional charges based on this information, but instead intended to use this information to establish a pattern of wrongdoing at trial when prosecuting the current charges against the congressman. *Congressman Accused of 2 New Bribery Schemes*, ASSOCIATED PRESS, Nov. 18, 2007.

²³ *Timeline*, *supra* note 16.

²⁴ See A. David Pardo et al., *Public Corruption*, 44 AM. CRIM. L. REV. 855, 868-69 (2007) (noting that after the Representative Jefferson scandal, the question "whether [the Speech or Debate Clause] may be raised as a defense to the execution of a warrant to search the office of a sitting Member of Congress . . . is no longer academic").

was unconstitutional as it violated the Speech or Debate Clause, the separation of powers principle, and the Fourth Amendment.”²⁵ Although the District Court upheld the constitutionality of the raid, on review, the D.C. Circuit reversed, expanding the Speech or Debate Clause’s testimonial privilege to the point where legislators themselves may be able to exert control over criminal investigations of their own activities.²⁶

Rather than allow this expansive reading in the context of the execution of a valid search warrant on a legislator’s congressional office, the privilege should instead mirror other constitutional privileges to accommodate the specific need for evidence in a criminal matter. Part I of this Article outlines the development of Speech or Debate Clause case law, tracing the Clause from its English roots through its U.S. interpretation in the 1970s, analyzing the split in the circuit courts regarding the scope of the clause, and finally interpreting the effect of *United States v. Rayburn*, the case addressing the constitutionality of the FBI’s raid on Representative Jefferson’s legislative office and Speech or Debate Clause jurisprudence. Part II argues that the Speech or Debate Clause’s testimonial privilege, as interpreted in *Rayburn*, is unnecessarily broad and undervalues the public interest in investigating government corruption, particularly when compared to other constitutional privileges. Finally, Part III

²⁵ *In re Search of the Rayburn House Office Bldg. Room No. 2113*, 432 F. Supp. 2d 100, 106 (D.D.C. 2006).

²⁶ *See United States v. Rayburn House Office Bldg. Room 2113*, 497 F.3d 654, 662-63 (D.C. Cir. 2007) (holding that the Speech or Debate Clause required that Representative Jefferson have the “opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents”). The exact remedy provided by the court under Rule 41 was “the return of all legislative materials (originals and copies) that are protected by the Speech or Debate Clause.” *Id.* at 666.

proposes that procedural safeguards and investigative filtering procedures are capable of striking a balance between competing interests so as to not unduly infringe upon legislators' testimonial privilege in the administration of justice. The concepts of "use" immunity and independent investigators are also examined as possible solutions.

I. TRACING THE EVOLUTION OF THE SPEECH OR DEBATE CLAUSE'S TESTIMONIAL PRIVILEGE

The Speech or Debate Clause has its roots in English law, where a similar provision was added to the English Bill of Rights in order to ameliorate conflict between the House of Commons and the Tudor and Stuart monarchs.²⁷ Its incorporation into the U.S. Constitution was largely uneventful, without documented discussion or opposition.²⁸

A. From English Roots to the U.S. Supreme Court

The clause's early days in the American legal landscape were similarly unremarkable. Before *United States v. Johnson* in 1966, the Supreme Court was rarely called upon to interpret the scope of the Speech or Debate Clause.²⁹ The *Johnson* Court prognosticated that the dearth of precedent on the clause's interpretation was due to the

²⁷ See *United States v. Johnson*, 383 U.S. 169, 177-78 (1966) (describing the incorporation of the clause into the United States Constitution). The clause was added to the English Bill of Rights in 1689 after a string of monarchs misused both criminal and civil law to "suppress and intimidate critical legislators." *Id.* at 178. For a full recollection of the clause's often controversial English history, see Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 893-97 (1985).

²⁸ *Johnson*, 383 U.S. at 177. Although the precise wording of the clause changed between its initial appearance in the Articles of Incorporation and its final form in the Constitution, this was for stylistic reasons. *Id.*

²⁹ *Id.* at 179 (noting the lack of precedent on the issue).

fact that “the tradition of legislative privilege is so well established in our polity,” leaving little need for “judicial illumination” on the clause.³⁰ Nonetheless, some basic tenets of the clause’s interpretation were hammered out in *Kilbourn v. Thompson*,³¹ which held in 1880 that the Speech or Debate Clause should be read broadly.³² Specifically, *Kilbourn* determined that the clause provides a substantive immunity which extends beyond mere “words spoken in debate” to instead encompass “things generally done in a session of the House by one of its members in relation to the business before it.”³³

In contrast to the initial lack of judicial involvement regarding the clause, the 1960s and 70s brought the Speech or Debate Clause before the Supreme Court numerous times, bringing about a rapid evolution in the Clause’s interpretation.³⁴ The *Johnson* Court’s holding, the first in this string of decisions, reigned in the *Kilbourn* Court’s expansive reading of the clause.

In that case, prosecutors brought criminal charges against a congressman who allegedly agreed to deliver a speech to the House of Representatives for money.³⁵ At trial, the government’s case relied heavily on the details surrounding the speech—the writing process, the involvement of administrative assistants, the motive for giving the speech, inquiry regarding specific sentences of the speech,

³⁰ *Id.*

³¹ 103 U.S. 168 (1880).

³² See *Johnson*, 383 U.S. at 180 (summarizing early Speech or Debate Clause precedent).

³³ *Kilbourn*, 103 U.S. at 204.

³⁴ See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 250 (2003) (“Building upon the *Kilbourn* and *Tenney* decisions, ten more Supreme Court decisions between 1966 and 1979 dramatically increased the jurisprudence concerning the federal Speech or Debate Clause.”).

³⁵ *Johnson*, 383 U.S. at 171-72.

and knowledge of facts supporting the claims made in the speech.³⁶

Although the Court found the inquiry into the Congressman's speech squarely precluded by the Speech or Debate Clause,³⁷ the Court's reading of the clause was narrow. First, the Court suggested that the scope of the immunity provided by the clause may only apply in a criminal context.³⁸ Such a reading confirms that the primary purpose of the immunity provided by the clause is the prevention of "intimidation by the executive and accountability before a possibly hostile judiciary."³⁹ Further restricting the clause, the *Johnson* Court gave great weight to the fact that the prosecution was made under a general criminal statute requiring intensive scrutiny of the congressman's "legislative acts," going so far as to explicitly suggest that a prosecution less reliant on legislative acts or pursued under a more specific statute might not be protected by the Speech or Debate Clause.⁴⁰

Importantly, *Johnson* impliedly differentiated the dual benefits of Speech or Debate Clause protection. At the time *Johnson* was decided, previous case law on the Speech or Debate Clause had only conferred to legislators total immunity from suit for their legislative

³⁶ *Id.* at 173-76.

³⁷ *See id.* at 177 ("We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.").

³⁸ *See id.* at 180-82 (drawing from the English history of the clause that the avoidance of intimidation the clause most directly seeks to protect is in the criminal context). *But see* *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 502 (1975) ("[T]he Clause provides protection against civil as well as criminal actions . . .").

³⁹ *Johnson*, 383 U.S. at 181.

⁴⁰ *Id.* at 184-85.

acts protected by the clause.⁴¹ In *Johnson*, the lower opinion of the Fourth Circuit followed this precedent of issuing total immunity under the clause, dismissing the entire count that relied on the inquiry to the congressman's speech.⁴²

The Supreme Court, however, distinguished previous case law, in which legislative acts constituted the entire basis for the charges before the Court, from the *Johnson* facts, where evidence of the Congressman's speech was only part of the evidence of a broader conspiracy charge.⁴³ Thus, the Court held that "[w]ith all references to this aspect of the conspiracy eliminated . . . the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause."⁴⁴ The *Johnson* Court, therefore, articulated a dual system of protection under the Speech or Debate Clause; where a charge is based wholly within the scope of a legislative act, the Speech or Debate Clause confers substantive immunity, but where the charge draws on additional acts beyond those protected by the clause, a testimonial privilege may be asserted to prevent the admission of legislative acts into evidence, but the legislator can still be prosecuted based upon the unprotected evidence.⁴⁵

⁴¹ See, e.g., *Kilbourn*, 103 U.S. at 200-04 (establishing the immunity function of the Speech or Debate Clause in the context of a claim of false imprisonment).

⁴² See *Johnson*, 383 U.S. at 185 ("The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety.").

⁴³ See *id.* ("The making of the speech, however, was only a part of the conspiracy charge.").

⁴⁴ *Id.*

⁴⁵ Some believe the substantive immunity provided by the Clause arises out of the testimonial privilege, despite the chronology of the case law on point. See, e.g., *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995) ("Based on the text of the Constitution, it would seem that the immunity from suit derives from the testimonial

The *Johnson* Court's contemplation of "legislative acts" led the Supreme Court to further refine the term in three subsequent Speech or Debate Clause decisions, each time further restricting the scope of the definition.⁴⁶ In determining that the Speech or Debate Clause did not immunize a legislator from a bribery prosecution, *United States v. Brewster* clarified that not all acts performed by legislators are "legislative acts."⁴⁷ Rather, the term applies only to those acts "generally done in Congress in relation to the business before it."⁴⁸ In *United States v. Gravel*, the Court further narrowed the scope of "legislative acts" to those which constitute "an integral part of the deliberative and communicative processes by which Members participate."⁴⁹ Finally, the Court in *United States v. Helstoski*⁵⁰ held that the term "legislative acts" extends only to those past acts which have already taken place.⁵¹ Thus, promises or future acts are beyond

privilege, not the other way around."). This is a logical, albeit irrelevant distinction. If a court presented with charges wholly based within the scope of a congressman's legislative acts refused to apply the substantive immunity conferred by the clause, the testimonial privilege would bar the admission of all the evidence on which such a charge would rely, effectively achieving the same result. Additionally, it should be noted that while *Johnson* implies the creation of the testimonial privilege through the reasoning described above, many courts cite its creation to *Gravel v. United States*, 408 U.S. 606, 615, 616 (1972), which first explicitly articulated and applied the privilege impliedly created in *Johnson*. See also *Brown & Williamson*, 62 F.3d at 418 ("[T]he Supreme Court recognized the testimonial privilege in *Gravel* . . .").

⁴⁶ Because only "legislative acts" are protected by the clause, whether by substantive immunity or through the testimonial privilege, the dual protections of the clause share the same precedent concerning the definition of "legislative acts."

⁴⁷ See *Brewster*, 408 U.S. at 516 (noting the purpose of the clause was not "to make Members of Congress super-citizens, immune from criminal responsibility").

⁴⁸ *Id.* at 512.

⁴⁹ *Gravel*, 408 U.S. at 625.

⁵⁰ 442 U.S. 477 (1979).

⁵¹ *Id.* at 489 ("[R]eferences to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause.").

the scope of the Speech or Debate Clause.⁵²

Documents used by those in the legislative branch and relating to “legislative acts” are within the scope of the Speech or Debate Clause. However, the Supreme Court in *Hutchinson v. Proxmire*,⁵³ a civil defamation suit against a legislator, clarified that only those documents with a legislative function are within the scope of the clause, leaving those documents merely relating to the legislative process, such as press releases, beyond the reach of the clause.⁵⁴ Like the Supreme Court precedent described above, the Court relied entirely on the definition of “legislative acts” to determine the applicability of the Speech or Debate Clause to the press releases at issue in the case,⁵⁵ rather than addressing how the documents were obtained and presented to the Court.⁵⁶

B. The Circuit Split: Determining the Scope of the Privilege

The lower courts have not interpreted the scope of the Supreme Court precedent uniformly, and have varying views on the propriety of judicial determinations in the context of Speech or Debate Clause protection. *United States v. Dowdy*,⁵⁷ which involved a

⁵² See *id.* (“Promises by a Member to perform an act in the future are not legislative acts.”).

⁵³ 443 U.S. 111 (1979).

⁵⁴ See *id.* at 130 (suggesting protection only for those documents essential to deliberation).

⁵⁵ See *id.* at 131 (“[A] Member’s published statements exert some influence on other votes in the Congress and therefore have a relationship to the legislative and deliberative process.”).

⁵⁶ The materials at issue in the case were widely distributed, and it is likely that the Congressman himself would not have to be subpoenaed in order for the plaintiff to obtain the relevant documents. See *id.* at 117 (noting that a newsletter at issue in the case was sent by the Congressman to over 100,000 of his constituents).

⁵⁷ 479 F.2d 213 (4th Cir. 1973).

former congressman's appeal from an eight-count conviction, best articulates the Second and Fourth Circuits' broad understanding of the Speech or Debate Clause.⁵⁸ The *Dowdy* Court held that all acts which are "purportedly or apparently legislative" fall within the scope of the clause.⁵⁹ The *Dowdy* Court went so far as to prohibit even the preliminary inquiry as to whether a congressman's act is "legislative in fact," stating that "[t]he privilege would be of little value if the[] [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."⁶⁰

Taking the opposite approach, the Third Circuit followed the Supreme Court's lead by construing the Speech or Debate Clause narrowly. This was best exemplified by *Government of the Virgin Islands v. Lee*,⁶¹ which explicitly authorized a preliminary judicial inquiry as to whether the legislator's acts in question were "legislative."⁶² The *Lee* Court, reviewing the dismissal of a four-count information against a sitting legislator, read *Helstoski's* distinction between past legislative acts, which are within the scope of the clause, and those future legislative acts beyond the reach of the clause as implying the necessity of an initial judicial inquiry.⁶³ Key to this finding was that the court viewed the Speech or Debate Clause testi-

⁵⁸ *Id.* at 216-17.

⁵⁹ *Id.* at 226.

⁶⁰ *Id.* (alteration in original) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951)).

⁶¹ 775 F.2d 514 (3d Cir. 1985).

⁶² *Id.* at 523.

⁶³ *Id.*

monial privilege as unlike the “attorney-client, physician-patient, or priest-penitent [privilege], the purpose of which is to prevent disclosures which would tend to inhibit the development of socially desirable confidential relationships,” and instead referred to it as a “use privilege,” unharmed by a judge’s *in camera* review.⁶⁴

Initially, it appeared that the approach of the D.C. Circuit would be more in line with the Third Circuit and the *Lee* decision than the Fourth Circuit and the *Dowdy* decision. In *McSurely v. McClellan*,⁶⁵ the D.C. Circuit found a sitting Senator and his aides immune under the Speech or Debate Clause for damages in a civil suit arising out of an allegedly unlawful seizure during a field investigation.⁶⁶ Noting the “finite limits” of the Speech or Debate Clause, the court undertook an inquiry as to whether the field investigation by a Senator and his staff fell within the scope of a subcommittee’s “province” such that the Senator’s acts were sufficiently “legislative” to fall within the scope of the clause.⁶⁷

Nonetheless, twenty years later, in *Brown & Williamson Tobacco Corp.*, the D.C. Circuit appeared to take a broad reading of the clause, seemingly at odds with *McSurely*. The case addressed whether two congressmen had to respond to a *subpoena duces tecum* in connection with third party civil litigation. The court held that the Speech or Debate Clause barred even the discovery of privileged ma-

⁶⁴ *Id.* at 523 (quoting *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 596 (3d Cir. 1978)).

⁶⁵ 553 F.2d 1277 (D.C. Cir. 1976).

⁶⁶ *Id.* at 1296-99.

⁶⁷ *See id.* at 1286-87 (concluding that the field investigation was sufficiently authorized as it “concerned matters ‘on which legislation could be had’ ” pursuant to a specific senate resolution) (quoting *Eastland*, 421 U.S. at 506)).

terials from congressmen, as it diverts their “ ‘time, energy, and attention’ ” from legislative functions.⁶⁸ In doing so, the court explicitly rejected the approach of the Third Circuit, which allowed the discovery of congressional documents followed by an *in camera* judicial inquiry as to whether they were sufficiently connected to “legislative acts” before their admission into evidence.⁶⁹

While the Supreme Court has traditionally narrowed the scope of Speech or Debate Clause privileges by refining the definition of “legislative acts,”⁷⁰ the *Brown & Williamson* Court implicitly expanded the scope of the clause by broadening “questioning” to include responding to a civil subpoena.⁷¹ The procedural question of the Speech or Debate Clause’s testimonial privilege was also brought into question by that court’s specific rejection of judicial review of the privilege relating to “the purposes for which the information is sought.”⁷² These holdings combine to place too great a control over the privilege in legislators’ own hands without providing for an explicit, effective procedure for judicial review. Over a decade later, addressing the case of Representative Jefferson in *United States v. Rayburn House Office Building*, the court would repeat this same mistake, expanding the scope of the clause through the definition of

⁶⁸ See *Brown & Williamson*, 62 F.3d at 418-21 (determining the “absolute protection” afforded by the clause regarding protected legislative material necessitates the extension of the privilege to third party civil discovery).

⁶⁹ See *id.* at 420 n.10 (rejecting the approach of the Third Circuit as advanced in *In re Grand Jury Investigation*, 587 F.2d at 589).

⁷⁰ See discussion *supra* Part I.A.

⁷¹ Cf. *Rayburn*, 497 F.3d at 668-69 (Henderson, J., concurring) (arguing that gathering legislative materials under a valid search warrant did not violate the Speech or Debate Clause because the congressman was not “questioned”).

⁷² *Brown & Williamson*, 62 F.3d at 420.

“questioning,” and thus giving investigated legislators an unjustified increase in control over information in a criminal case.

C. The D.C. Circuit Addresses the Case of Representative Jefferson: *United States v. Rayburn*

Noting that “[t]he Supreme Court has not spoken to the precise issue at hand,” as the case represented “the first time a sitting Member’s congressional office has been searched by the Executive,”⁷³ the *Rayburn* Court unsurprisingly relied heavily upon *Brown & Williamson*. The court summarized its holding in *Brown & Williamson* as “mak[ing] clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put.”⁷⁴

Despite deciding *Brown & Williamson* in the context of a civil matter, the majority apparently had no qualms about applying its holding to the criminal prosecution of Representative Jefferson, stating that “the [*Brown & Williamson*] [C]ourt’s discussion of the Speech or Debate Clause was more profound and repeatedly referred to the functioning of the Clause in criminal proceedings.”⁷⁵ In the application of these tenets to the search of Representative Jefferson’s legislative office, the court gave no weight to the ample procedural safeguards and investigative filtering procedures put in place to protect Representative Jefferson’s privilege.⁷⁶ Instead they found the

⁷³ *Rayburn*, 497 F.3d at 659.

⁷⁴ *Id.* at 660.

⁷⁵ *Id.*

⁷⁶ The FBI “exhausted all other reasonable methods to obtain” the evidence sought before

privilege violated, as the executive did “not deny that compelled review by the Executive occurred, nor that it occurred in a location where legislative materials were inevitably to be found, nor that some impairment of legislative deliberations occurred.”⁷⁷

Finding Representative Jefferson’s privilege violated, the *Rayburn* Court went on to prescribe investigatory procedures that would not have violated the Speech or Debate Clause.⁷⁸ Convinced that “[t]he historical record utterly devoid of Executive searches of congressional offices [suggests that the issue will arise] at most, infrequent[ly],” the court specifically suggested “sealing the office to be searched before the Member is afforded an opportunity to identify potentially privileged legislative materials prior to any review by Executive agents.”⁷⁹ While the court did not endorse notifying the Member before executive agents arrived to search the Member’s office, the court firmly held that “seriatim initial reviews by agents of the Executive of a sitting Member’s congressional office” are inconsistent with the clause’s privilege. Since Representative Jefferson did not argue that his privilege could not be judicially reviewed,⁸⁰ the issue became exactly when and to what degree the Congressman should be involved in asserting his privilege, and the *Rayburn* hold-

seeking a warrant to raid the congressman’s office, conducted the search using agents with no other substantive role in the investigation, and employed a filter team to shield the prosecution team from exposure to evidence protected by the clause. See *id.* at 656-57 (outlining the special procedures employed in the raid). For an in-depth review and analysis of the measures employed in the raid of Representative Jefferson’s legislative office, see discussion *infra* Part III.A.

⁷⁷ *Rayburn*, 497 F.3d at 661.

⁷⁸ To its credit, the court did state the precise mechanisms that should mediate future investigations are “best determined by the legislative and executive branches.” *Id.* at 663.

⁷⁹ *Id.*

⁸⁰ *Id.* at 662.

ing allows legislators early, extensive, and unnecessary control of information in the context of a white collar crime investigation.

II. THE SPEECH OR DEBATE CLAUSE’S TESTIMONIAL PRIVILEGE AS GRANTED IN *UNITED STATES V. RAYBURN* IS UNNECESSARILY BROAD AND UNDERVALUES THE PUBLIC INTEREST IN PREVENTING GOVERNMENT CORRUPTION

In addition to expanding the scope of the Speech or Debate Clause’s testimonial privilege by holding that response to a valid search warrant constitutes “questioning” under the clause, *Rayburn* also drastically changed the landscape of the privilege in another way. By placing the initial, potentially unlimited control of Speech or Debate Clause privilege in the hands of the legislator being investigated, the *Rayburn* Court radically changed the distribution of the most essential investigatory element—information. The importance of information control has been described as:

[T]he hallmark of white collar crime “The defense attorney’s first objective is to prevent the government from obtaining evidence that could be inculpatory of his client and used by the investigator or prosecutor to justify issuance of a formal criminal charge.” These lawyers do not try to convince a jury that the evidence is inadequate after letting [the] government gather its information. Instead, they work to keep documents, clients, and witnesses away from government agents so that a charge can be avoided or a trial won. . . . Although other attorneys also seek information control . . . none make it as central [as white collar practitioners].⁸¹

⁸¹ M. David Ermann, 15 CONTEMP. SOC. 71, 71-72 (1986) (reviewing KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985) and LOUISE I. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* (1984)) (internal citations omitted).

The degree of information control *Rayburn* grants investigated legislators is inconsistent with both previous Speech or Debate Clause precedent and the treatment of other testimonial privileges conferred by the Constitution. As argued by the concurring opinion of Judge Henderson in *Rayburn*, and implied throughout Supreme Court precedent on the matter,⁸² the Speech or Debate Clause fails to provide legislators with any sort of exemption from criminal process. Moreover, other testimonial privileges grounded in the Constitution, such as the Fifth Amendment's privilege against self-incrimination and executive branch privileges are capable of accommodating the specific need for evidence in criminal matters.

A. The Speech or Debate Clause Does Not Provide an Exemption From Criminal Process

Judge Henderson is correct in her *Rayburn* concurrence that previous Speech or Debate Clause precedent fails to provide legislators with an exemption from criminal process. In *Gravel*, the Supreme Court first addressed the Speech or Debate Clause's extension into the criminal context, stating that the clause "does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true."⁸³ The Supreme Court has echoed this sentiment in additional cases. In *Brewster*, the Court stated that the "privilege was designed to preserve leg-

⁸² See, e.g., *Rayburn*, 497 F.3d at 668 (Henderson, J., concurring) ("[T]he Supreme Court has made clear that the Clause 'does not purport to confer a general exemption upon Members of Congress' from criminal process." (quoting *Gravel*, 408 U.S. at 626)).

⁸³ *Gravel*, 408 U.S. at 626.

islative independence, not supremacy,”⁸⁴ specifically warning against such a broad interpretation of the privilege as to “make Members of Congress super-citizens, immune from criminal responsibility.”⁸⁵

Using the above precedent to more appropriately frame the issue, Judge Henderson criticized the majority’s reliance on *Brown & Williamson* due to the vast differences between the civil subpoenas at issue and the execution of a valid search warrant as contemplated by *Rayburn*.⁸⁶ She noted that:

Answering a civil subpoena requires the individual subpoenaed to affirmatively act; he either produces the testimony/documents sought or challenges the subpoena’s validity. In contrast, a search warrant requires that the individual whose property is to be searched do nothing affirmative. Instead, the search must first meet the requirements of the Fourth Amendment via the prior approval of “a neutral and detached magistrate.”⁸⁷

As a search warrant requires no affirmative act from the legislator being investigated, Judge Henderson differed with the majority, determining that this did not constitute “questioning” under the clause.⁸⁸

Judge Henderson analogized this distinction between affirmatively answering a subpoena and passively being the target of a

⁸⁴ *Brewster*, 408 U.S. at 508.

⁸⁵ *Id.* at 516.

⁸⁶ *Rayburn*, 497 F.3d at 666-67 (Henderson, J., concurring) (referring to the *Brown & Williamson* Court’s discussion of the Speech or Debate Clause’s testimonial privilege in the criminal context as mere “dicta no matter how ‘profound.’”).

⁸⁷ *Id.* at 669 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁸⁸ *See id.* (“The FBI agents’ execution of the warrant on Rep. Jefferson’s congressional office did not require the latter to do anything and accordingly falls far short of the ‘question[ing]’ the court in *Brown & Williamson* found was required of a Member in response to a civil subpoena.”).

search pursuant to a valid warrant to the Fifth Amendment privilege against self-incrimination.⁸⁹ Under the Fifth Amendment's testimonial privilege, "[a] party is privileged from producing the evidence, but not from its production."⁹⁰ Applying the treatment of this constitutional testimonial privilege to that of the Speech or Debate Clause, it reasons that, although legislators may assert their privilege when questioned, absent such interrogation, congressmen should not necessarily be able to object to the mere production of material protected by the Speech or Debate Clause.

B. Comparison to Other Testimonial Privileges Under the Constitution

The utility of looking to the treatment of other constitutional privileges in construing the Speech or Debate Clause privilege does not end there. Given the fact that very few testimonial privileges are based in the Constitution, it seems reasonable to interpret the evolution of the Speech or Debate Clause in light of the more jurisprudentially developed doctrines of the Fifth Amendment and the executive privilege.⁹¹

A hallmark of both the Fifth Amendment and the executive privilege is that they are capable of accommodating the pursuit of

⁸⁹ See *id.* (noting that under the execution of a valid search warrant, one is not *required to respond* under either the Fifth Amendment nor the Speech or Debate Clause).

⁹⁰ *Johnson v. United States*, 228 U.S. 457, 458 (1913).

⁹¹ The *Rayburn* majority analogized the Speech or Debate Clause testimonial privilege to the attorney-client privilege in order to draw a comparison as to when privilege holders must be given an opportunity to exercise their privilege. *Rayburn*, 497 F.3d at 662. However, this comparison is of suspect value, as the attorney-client privilege is only "found in state court rules or state statutes and the Federal Rules of Evidence," with no constitutional grounding. C. Evan Stewart, *The Attorney-Client Privilege and the Internet: Strange Bedfellows?*, 205 PRACTISING L. INST., 149, 151 n.2 (2006) (internal citations omitted).

more substantial prosecutorial interests. In this context, immunity grants are offered commensurate with Fifth Amendment protections so that prosecutors might get at otherwise privileged testimony.⁹² In the case of the executive privilege, a generalized interest in confidentiality cannot overcome the specific need for evidence in a criminal matter.⁹³

Although largely undeveloped, even the District of Columbia Circuit in *Brown & Williamson* recognized that *Gravel* implies at least some degree of balancing of interests when analyzing the Speech or Debate Clause, leaving room for the possibility that the clause might be able to similarly accommodate other prosecutorial interests. In *Brown & Williamson*, the court stated that “*Gravel*’s sensitivities to the existence of criminal proceedings against persons other than Members of Congress at least suggest that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest, but is ‘absolute’ in all other contexts.”⁹⁴ Although the *Rayburn* majority recognized this limitation on the clause, it nonetheless completely discounted the interest in law enforcement’s investigation and prosecution of Representative Jefferson.⁹⁵ This approach severely undervalues the substantial public, and indeed gov-

⁹² See discussion *infra* Part II.B.2.

⁹³ See discussion *infra* Part II.B.3.

⁹⁴ *Brown & Williamson*, 62 F.3d at 419-20.

⁹⁵ See *Rayburn*, 497 F.3d at 662-63 (“Although the court has acknowledged, where it is not a Member who is subject to criminal proceedings, that the privilege might be less stringently applied when inconsistent with a sovereign interest, this observation has no bearing here. . . .” (internal citation omitted)). The court’s opinion leaves it unclear exactly why the balancing of interests fails here. Conceivably, it could either be that in *Rayburn*, it was a member who was subject to criminal proceedings, or the interest in law enforcement was simply outweighed by the weight of the privilege, regardless of the defendant’s identity.

ernmental, interest in policing government corruption.

1. *The Case For a Heightened Interest in Combating Government Corruption*

While the general interest in investigating and prosecuting criminal acts is certainly applicable in Representative Jefferson's case, the weight of the interest should be increased when the subject of such an investigation is an elected official. Accordingly, the idea of a substantial government interest in combating public corruption has been advanced in many different contexts. Addressing issues of campaign finance, the Supreme Court in 1976 specifically recognized "the governmental interest in preventing corruption and the appearance of corruption" in *Buckley v. Valeo*.⁹⁶ The case addressed proposed campaign finance reform in relation to the same illicit dealings Representative Jefferson was accused of engaging in, which involved a system of "large contributions . . . given to secure a political quid pro quo from current and potential office holders, [by which] the integrity of our system of representative democracy is undermined."⁹⁷

Recent Supreme Court decisions continue to reflect the heightened interest in preventing government corruption. In the campaign finance context, the interest in combating government corruption has won out over an increasingly broad set of First Amendment concerns.⁹⁸ Most recently in *Federal Election Commission v.*

⁹⁶ 424 U.S. 1, 45 (1976).

⁹⁷ *Id.* at 26-27.

⁹⁸ See Aaron R. Petty, Note, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 872 (2006) ("Recently, the Supreme Court has held that the governmental incentive in combating public corruption to preserve public confidence in the democratic system outweighs even the strong First Amendment issues at play in the political

Wisconsin Right to Life, Inc.,⁹⁹ the Court ruled that entities such as corporations and unions can engage in issue advertising with the caveat that a reasonable observer would not perceive the ad as endorsing one particular candidate over another.¹⁰⁰

The proposition that the weight of the interest in combating public corruption is more substantial than the interest in combating private fraud is also well-supported. In addressing to what extent the right of honest services under the mail fraud statute¹⁰¹ extended to the private sector, the Sixth Circuit stated:

[A]pplication of the “right to honest services” doctrine to the private sector is problematic. The right of the public to the honest services of its officials derives at least in part from the concept that corruption and denigration of the common good violates “the essence of the political contract.” Enforcement of an intangible right to honest services in the private sector, however, has *a much weaker justification* because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving “honest services” for their own sake.¹⁰²

process.”).

⁹⁹ 127 S. Ct. 2652 (2007).

¹⁰⁰ *Id.* at 2667. See also *McConnell v. FEC*, 540 U.S. 93, 156 (2003) (“The Government’s strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations” of the Bipartisan Campaign Reform Act of 2002). For another discussion of the interest in preventing government corruption in a context outside the specific context of campaign finance reform, see *Petty*, *supra* note 98, at 872.

¹⁰¹ 18 U.S.C. § 134-6 (2000) (including in the definition of a “ ‘scheme or artifice to defraud’ . . . a scheme or artifice to deprive another of the intangible right of honest services”).

¹⁰² *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997) (emphasis added) (internal citation omitted). See also Daniel C. Cleveland, *Once Again, It Is Time to “Speak More Clearly” About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. KY. L. REV. 117, 145 n.241 (2007) (arguing that another justification for government fraud outweighing private fraud is that “in private fraud cases, the victims are often small in number relative to public fraud cases”).

Similarly, fraud in the form of political corruption or bribery has “ethereal” consequences relating to the legitimacy of government such that the state interest in preventing government corruption should be weighed more substantially than a similar interest in combating private fraud. In the words of Justice Brandeis, “[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁰³ Even the Federal Sentencing Guidelines evidence these heightened consequences, allowing an upward departure from the guidelines where the defendant’s conduct would contribute to the public’s loss of confidence in the government.¹⁰⁴

With a heightened interest in combating government corruption firmly established in the above sources, the question becomes precisely when legislators’ Speech or Debate Clause privileges should accommodate the prosecution of public corruption. In a case like Representative Jefferson’s, the public overwhelmingly supports the idea that legislators’ Speech or Debate Clause privileges should accommodate a substantial interest in law enforcement. Eighty-six percent of Americans believe “the FBI should be allowed to search a Congress member’s office if it has a warrant [regardless of] separation of powers, precedent, and the possibility prosecutors could use such searches to try to intimidate lawmakers.”¹⁰⁵ In order to pro-

¹⁰³ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¹⁰⁴ See U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (2008) (articulating upward departure provisions).

¹⁰⁵ Langer, *supra* note 10. The poll found that this conclusion was “broadly bipartisan . . . ranging from 78 percent among Democrats to 94 percent of Republicans.” *Id.*

pose a suitable standard, it is logical to look to other constitutional testimonial privileges, which accommodate prosecutorial interests in certain situations to determine exactly where the line should be drawn.

2. *Like the Fifth Amendment's Testimonial Privilege, the Speech or Debate Clause's Testimonial Privilege Should Accommodate Superseding Prosecutorial Interests*

The Supreme Court in *Kastigar v. United States*¹⁰⁶ addressed “whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.”¹⁰⁷ Although previous decisions had upheld the constitutionality of immunity grants and compelled testimony in relation to the Fifth Amendment’s privilege,¹⁰⁸ *Kastigar* explicitly reaffirmed earlier precedent and spoke clearly about when immunity should be granted, and the substantial procedural protections that remain for those compelled to testify.¹⁰⁹

Currently, 18 U.S.C. §§ 6001-6005¹¹⁰ collectively govern the administration of witness immunity. 18 U.S.C. § 6002 provides, in

¹⁰⁶ 406 U.S. 441 (1972).

¹⁰⁷ *Id.* at 442.

¹⁰⁸ See, e.g., *Brown v. Walker*, 161 U.S. 591 (1896); *Ullmann v. United States*, 350 U.S. 422 (1956).

¹⁰⁹ See *Kastigar*, 406 U.S. at 448 (“We . . . reaffirm the decisions in *Brown* and *Ullmann*.”).

¹¹⁰ 18 U.S.C. §§ 6001-6005 (2000).

relevant part:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding . . . and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .¹¹¹

Section 6003 allows U.S. Attorneys to request an immunity order when: “the testimony or other information from such individual may be necessary to the public interest; and [two], such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.”¹¹²

The *Kastigar* Court noted that immunity statutes such as §§ 6001-6005 show “that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.”¹¹³ Mirroring these purposes, the U.S. Attorneys’ Manual lists several factors for determining when an immunity request is in the public interest, which are:

The importance of the investigation or prosecution to effective enforcement of the criminal laws; [t]he value of the person’s testimony or information to the investigation or prosecution; [t]he likelihood of prompt and

¹¹¹ 18 U.S.C. § 6002.

¹¹² 18 U.S.C. § 6003 (b)(1), (2).

¹¹³ *Kastigar*, 406 U.S. at 446.

full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance; [t]he person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history; [t]he possibility of successfully prosecuting the person prior to compelling his or her testimony; [t]he likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.¹¹⁴

In *Kastigar*, the main constitutional challenge to immunity statutes was that, because they provided only “use” immunity rather than full transactional immunity, the protection granted was not commensurate to the suspended privilege.¹¹⁵ However, the Court found the language of § 6002 to comport with the scope of Fifth Amendment protection, “and therefore . . . sufficient to compel testimony over a claim of the privilege.”¹¹⁶ Key to the *Kastigar* Court's finding that use immunity is coextensive with the Fifth Amendment privilege against self-incrimination were the “substantial [procedural] protection[s]” afforded those who testify under immunity.¹¹⁷

Many of these mechanisms and protections could easily be extended to those legislators who assert the Speech or Debate Clause testimonial privilege. Under the Fifth Amendment, immunity is granted to a witness, removing the risk of incrimination commensu-

¹¹⁴ U.S. ATTORNEYS' MANUAL § 9-23.210 (2006).

¹¹⁵ See *Kastigar*, 406 U.S. at 449 (“Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use.”).

¹¹⁶ *Id.* at 453.

¹¹⁷ See *id.* at 460-61 (noting that the prosecution's burden of affirmatively showing that evidence is not tainted in a future prosecution provides substantial protection commensurate with the scope of Fifth Amendment privilege).

rate with the scope of the Fifth Amendment so that the government may have access to evidence that would otherwise be unavailable due to the privilege. Similarly, legislators could be granted immunity for any privileged information accidentally uncovered in an investigation so that the government may access the nonprivileged materials in a given locale.

Neither the Fifth Amendment nor the Speech or Debate Clause privilege “has . . . been construed to mean that one who invokes it cannot subsequently be prosecuted,” allowing subsequent prosecution based on nonprivileged evidence.¹¹⁸ In the Fifth Amendment context, the burden-shifting mechanism of immunity regarding tainted evidence provides “substantial [procedural] protection” commensurate with the scope of the privilege in the context of a future prosecution.¹¹⁹ This burden-shifting is not just to combat tainted evidence, but rather to ensure that the evidence the prosecution “proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”¹²⁰ Incorporating a similar burden-shifting mechanism in future prosecutions of those who initially assert the Speech or Debate Clause testimonial privilege could provide legislators granted immunity in order to pursue the interest in preventing government corruption with similar procedural protection. However, the question then becomes whether the protection of the burden-shifting mechanism is commensurate with the Speech or De-

¹¹⁸ *Id.* at 453. See also *Johnson*, 383 U.S. at 185 (“[T]he Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.”).

¹¹⁹ *Kastigar*, 406 U.S. at 460-61.

¹²⁰ *Id.* at 460.

bate Clause privilege. Discussion of this and other questions relating to the feasibility of immunity grants as a solution to balancing the competing interests of legislators' Speech or Debate Clause privileges and the interest in policing government corruption is taken up below in Part III.B.1.

3. ***Like the Communicative Privilege Enjoyed by the Executive Branch, the Generalized Interest in Confidentiality Recognized by the Speech or Debate Clause Should Not Prevail Over the Specific Need for Evidence in a Criminal Matter***

The comparison of legislators' Speech or Debate Clause testimonial privilege to the Fifth Amendment privilege against self-incrimination is admittedly an imperfect one. The Speech or Debate Clause seeks to protect a wider range of interests than the Fifth Amendment, which does not touch upon sensitive separation of powers issues. A hypothetical grant of immunity under the Speech or Debate Clause seeks to get at evidence that is not privileged in the first place in order to gain evidence against the person who first asserted the privilege. Conversely, a grant of immunity under the Fifth Amendment seeks access to privileged evidence in order to gain evidence against a third party. However, there is another constitutional privilege which shares a number of salient factors with the Speech or Debate Clause—the executive privilege as established in *United States v. Nixon*.¹²¹

Like the Speech or Debate Clause privilege, executive privi-

¹²¹ 418 U.S. 683, 708 (1974) (finding “Presidential communications” to be “presumptively privileged”).

lege is founded in ideas of separation of powers and branch independence.¹²² The *Nixon* Court addressed the claim of an absolute privilege in the context of a refusal to answer a *subpoena duces tecum* in relation to a criminal matter, but found that neither separation of powers nor the need for confidential high-level communication were enough to justify “absolute, unqualified Presidential privilege of immunity from judicial process.”¹²³

Although the Court noted the possibility that specific claims of privilege, such as “a claim of need to protect military, diplomatic, or sensitive national security secrets,” may shift the balance of interests, it determined that a “generalized interest in confidentiality” cannot support an absolute privilege.¹²⁴ The Court thus endeavored to resolve the competing interests in the general principle of executive confidentiality and the specific need for evidence in a criminal matter in a manner that preserved the essential functions of both the judicial and executive branches.¹²⁵

Unlike the *Brown & Williamson* and *Rayburn* Courts, the *Nixon* Court gave substantial weight to the interests of law enforcement, noting its concern that withholding evidence “demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.”¹²⁶

¹²² See *id.* at 706 (“The second ground asserted by the President’s counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch [operates] within its own sphere. . .”).

¹²³ *Id.* at 687-88, 706.

¹²⁴ *Id.* at 706, 711.

¹²⁵ See *id.* at 707 (“Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.”).

¹²⁶ *Nixon*, 418 U.S. at 712. See also *supra* text accompanying notes 95-96.

The Court further noted that “[t]he President’s broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.”¹²⁷

The interests at issue in Speech or Debate Clause balancing are analogous. While the interest in maintaining an independent legislature free from the harassment of other branches is certainly substantial, it is also broad and generalized. As was the case in *Nixon*, the specific need for evidence was established in Representative Jefferson’s case; a valid search warrant was executed.¹²⁸ Given the outcome in *Nixon*, it seems the testimonial privilege should yield to law enforcement in that situation, even if the privilege is based in the Constitution.

In fact, Representative Jefferson’s case in *Rayburn* provides an even more compelling argument that the interest in law enforcement should prevail. In *Nixon*, the specific evidence sought was the subject of the privilege claim, throwing more weight behind the claim of executive privilege.¹²⁹ In *Rayburn*, on the other hand, the warrant specifically sought only evidence *not* subject to the privilege; the prosecution of Representative Jefferson rested solely on nonprivileged evidence.¹³⁰ Furthermore, procedural safeguards and investiga-

¹²⁷ *Nixon*, 418 U.S. at 713.

¹²⁸ *Rayburn*, 497 F.3d at 656-57.

¹²⁹ *Nixon*, 418 U.S. at 687-88. Charges were brought against seven named individuals in *Nixon*. *Id.* at 687. The *subpoena duces tecum* sought “certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President” and the named defendants, which were identified specifically using White House logs and appointment records. *Id.* at 687-88.

¹³⁰ See *Rayburn*, 497 F.3d at 656-57 (documenting the “special procedures” set forth in the search warrant affidavit designed to limit the investigation of privileged information).

tive filtering procedures were in place to control the privileged information incidentally uncovered.¹³¹ Under these distinguishing facts, it seems the interest for upholding the privilege is even weaker in *Rayburn* than it was in *Nixon*.

Finally, analysis of *Nixon* and the treatment of the executive privilege reveals substantial procedural protections available once the constitutional privilege has been suspended, similar to those outlined in relation to the Fifth Amendment privilege in *Kastigar*. Like the burden-shifting mechanism described in *Kastigar*, a district court which receives a claim of executive privilege in response to a subpoena must “treat the subpoenaed material as presumptively privileged and . . . require the Special Prosecutor to demonstrate that the Presidential material was ‘essential to the justice of the [pending criminal] case.’”¹³² *In camera* review is required so only those privileged documents that are relevant and admissible lose their protection.¹³³ The district court is under a “very heavy responsibility” to “scrupulous[ly] protect[] against any release or publication of material not found by the court, [which is] admissible in evidence and relevant to the issues of the trial for which it is sought.”¹³⁴ This degree of protection is also afforded to those privileged items which do not make it to trial, but instead are excised from evidence during *in camera* review; “once the decision is made to excise, the material is

¹³¹ See *supra* text accompanying note 76. See also discussion *infra* Part IV.A.

¹³² *Nixon*, 418 U.S. at 713 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807)).

¹³³ *Id.* at 714 (“Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised.”).

¹³⁴ *Id.* at 714-15.

restored to its privileged status and should be returned under seal to its lawful custodian.”¹³⁵ Incorporating similar procedural safeguards and standards of evidentiary protection in Speech or Debate Clause jurisprudence may provide legislators with protection commensurate to that conferred by the clause where the interest in preventing government corruption supersedes a claim of testimonial privilege.

III. PROCEDURAL SAFEGUARDS AND DEPARTMENT OF JUSTICE FILTERING PROCEDURES CAN ACCOMMODATE LEGISLATORS’ TESTIMONIAL PRIVILEGE IN THE COURSE OF CRIMINAL INVESTIGATIONS

The previous section argued for the recognition of a substantial interest in combating government corruption¹³⁶ and outlined procedural safeguards incorporated by other constitutional privileges when they are suspended to pursue superseding prosecutorial interests.¹³⁷ While the *Rayburn* Court erred in dismissing the balancing of interests called for in *Gravel*, if a court were to hold that the governmental interest in preventing corruption outweighed the interest in legislators’ testimonial privilege, these procedural protections should be applied in the Speech or Debate Clause context to provide as much deference as possible to legislators’ rights.¹³⁸

To effectuate this change in Speech or Debate Clause jurisprudence, internal Department of Justice (“DOJ”) and statutory criteria similar to those utilized in order to determine when to confer im-

¹³⁵ *Id.* at 716.

¹³⁶ *See supra* Part II.B.1.

¹³⁷ *See supra* Part II.B.2-3.

¹³⁸ *See Rayburn*, 497 F.3d at 660 n.4 (noting the application of the Speech or Debate Clause testimonial privilege in the instant case is not “inconsistent with a sovereign interest”) (quoting *Brown & Williamson*, 62 F.3d at 419-20).

munity should be developed to help U.S. Attorneys and courts, respectively, decide when legislators' testimonial privilege should yield to the specific interest in policing government corruption.¹³⁹ Mandatory *in camera* review should excise those privileged items not relevant or admissible, with the District Court protecting privileged items to the same standard as prescribed by the Court in *Nixon*.¹⁴⁰ During *in camera* review, when legislators claim the privilege to communications, they should be presumptively protected, as is done under the executive privilege.¹⁴¹ As is the case with the Fifth Amendment privilege,¹⁴² if any subsequent prosecution occurs, a burden-shifting mechanism should place a substantial burden on the prosecutors to show that their evidence does not make use of privileged information.

Despite the promise in the procedural measures outlined above, there are other additional options that can help accommodate the fight against government corruption when legislators' Speech or Debate Clause testimonial privilege is at issue. In the process of investigating Representative Jefferson, the FBI implemented numerous filters and information control techniques designed to minimize infringement of the Speech or Debate Clause privilege.¹⁴³ Were these or similar techniques to gain acceptance among courts, investigators, and legislators, the burden placed on the courts to draw an appropriate line between the competing interests would be minimized and the

¹³⁹ See *supra* text accompanying note 114.

¹⁴⁰ See *supra* text accompanying notes 132-35; *Nixon*, 418 U.S. at 714.

¹⁴¹ See *supra* text accompanying note 132.

¹⁴² See *supra* text accompanying notes 120-21.

¹⁴³ See *Rayburn*, 497 F.3d at 656-57 (documenting the "special procedures" set forth in the search warrant affidavit designed to limit the investigation of privileged information).

danger of a slippery slope averted.¹⁴⁴ Additionally, grants of use immunity and the appointment of independent investigators might be used to supplement the procedural protections and investigative filtering procedures.

A. Analyzing the Filtering Procedures Used in *United States v. Rayburn*

As mentioned above, the FBI undertook numerous procedural safeguards and investigative filtering procedures in order to protect Representative Jefferson's Speech or Debate Clause privilege in the course of its investigation. This section will review the FBI techniques used in the investigation of Representative Jefferson and pull from them specific suggestions for internal guidelines which can best accommodate the privilege in the context of future criminal investigations.

1. Pre-warrant Safeguards

Not the least of the protections utilized in the investigation of Representative Jefferson occurred before the search warrant was ever issued. While speaking with one of Representative Jefferson's staff, the FBI learned that records relevant to the specific charges being investigated were indeed in the Congressman's legislative office.¹⁴⁵ Significantly, the warrant affidavit "asserted that the Executive had exhausted all other reasonable methods to obtain these records in a

¹⁴⁴ It is appropriate here to echo the call of the *Rayburn* majority that the precise investigative procedures designed to mediate between the competing interests at issue are something best determined by the legislative and executive branches themselves. *See id.* at 663.

¹⁴⁵ *Id.* at 656.

timely manner.”¹⁴⁶

As contemplated by the warrant issued in Representative Jefferson’s investigation, legislative offices are bound to contain materials protected by the Speech or Debate Clause.¹⁴⁷ Therefore, having pre-search requirements and preparations is necessary to effectively accommodate legislators’ Speech or Debate Clause privileges. Although the approval of a search warrant necessitates a finding of probable cause,¹⁴⁸ perhaps a requirement of particularized facts that relevant information exists in a legislative office should be required. As was the case with Representative Jefferson’s investigation, such particularized facts can be gathered by the more traditional and less sensitive methods of interviewing staff, aides, and other participants in a criminal enterprise. This requirement would simultaneously shield legislators from the harassing fishing expeditions at the heart of the Speech or Debate Clause’s purpose. To further this end, before searching a legislative office, all other reasonable methods of obtaining the information at issue should be exhausted.

¹⁴⁶ *Id.*

For months, the government repeatedly tried and failed—due in part to Rep. Jefferson’s invocation of his Fifth Amendment right—to obtain records in his congressional office via a series of subpoenae *duces tecum*. Only after failing to obtain the records through investigative means within Rep. Jefferson’s ability to control did the government turn to a search warrant. . . .

Id. at 669 n.7 (Henderson, J., concurring) (internal citations omitted).

¹⁴⁷ *Id.* at 661 (majority opinion).

¹⁴⁸ See U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

2. *Post-warrant “Special Procedures”*

A different set of safeguards governed the post-warrant phase of the Representative Jefferson investigation. First, the agents who carried out the actual raid of the Congressman’s legislative office had “no [other] substantive role in the investigation.”¹⁴⁹ These agents were instructed “to review and seize paper documents responsive to the warrant, copy all electronic files on the hard drives or other electronic media in the Congressman’s office, and then turn over the files for review by a filter team.”¹⁵⁰ At the conclusion of this portion of the investigation, the raiding agents transmitted the fruits of their search to the filter team, and were instructed “not to reveal politically sensitive or non-responsive items ‘inadvertently seen . . . during the course of the search.’”¹⁵¹

The filter team, consisting of two DOJ attorneys and one FBI agent, was charged with determining “whether any of the seized documents were not responsive to the search warrant, and . . . whether any of the seized documents were subject to the Speech or Debate Clause privilege or [any] other privilege.”¹⁵² Those materials subject to the Speech or Debate Clause testimonial privilege or non-responsive to the warrant were returned to Representative Jefferson without any dissemination to the prosecution team. Those materials determined not privileged were given to prosecutors, with copies sent to Representative Jefferson’s lawyer. Finally, the district court would

¹⁴⁹ *Rayburn*, 497 F.3d at 656.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 656-57.

review the materials the filter team determined potentially privileged, keeping a log of such documents and providing copies to the Congressman's attorney.¹⁵³

The investigation team's post-warrant procedures were significantly less successful in minimizing infringement on Representative Jefferson's Speech or Debate Clause privileges. While screening the investigatory agents from further involvement in the case is a worthy protection, adding a separate filter team is an unnecessary layer of bureaucracy. Were the filter team to actually conduct the search of the office themselves, determining privilege status before any items were taken from the office, less infringing material would have been seized from Representative Jefferson. Moreover, fewer executive agents would have been exposed to infringing material, lessening any offense to the clause. Thus, in future investigations, the filter team should consist of agents at the scene of the investigation who check for privilege status taking place on site to the extent feasible.

The treatment of Representative Jefferson's computer files is particularly troublesome. By merely copying all electronic material in the Congressman's office, the executive presumably remained in possession of countless privileged documents while the filter team performed key word searches offsite. The search and seizure of electronic data presents investigators with unique problems, and the exact search method employed in a particular case is determined by numer-

¹⁵³ *Id.*

ous factors beyond the scope of this Article.¹⁵⁴ The decision to copy all electronic files from Representative Jefferson's office for later examination by the filter team was based primarily on the FBI's desire to "minimize disruption" of Representative Jefferson's legislative duties.¹⁵⁵ Although the use of a filter team is one of the "[p]referred practices" identified by recent DOJ internal guidelines,¹⁵⁶ it was an inadequate approach in Representative Jefferson's case because it allowed an inordinate amount of privileged material to remain in the hands of the executive unnecessarily. While it is true that the Speech or Debate Clause protects members of Congress from distractions that "divert their time, energy, and attention from their legislative tasks,"¹⁵⁷ it seems the more egregious offense under the clause is executive possession of privileged material. No FBI investigation can occur without at least minimal disruption of a legislator's time,¹⁵⁸ but it does not follow that any more privileged material than necessary should be taken from the legislator. Thus, in future investigations, the use of a filter team may not be the best method of handling potentially privileged electronic data.

¹⁵⁴ For a review of issues inherent in the search and seizure of electronic data as well as DOJ internal guidelines on the matter, see U.S. DEP'T OF JUSTICE, FEDERAL GUIDELINES FOR SEARCHING AND SEIZING COMPUTERS (1994), http://epic.org/security/computer_search_guidelines.txt [hereinafter FEDERAL GUIDELINES FOR SEARCHING AND SEIZING COMPUTERS].

¹⁵⁵ *Rayburn*, 497 F.3d at 669-70 (Henderson, J., concurring).

¹⁵⁶ U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS § II.B.7.b (2002), http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.htm#_II_ [hereinafter SEARCHING AND SEIZING COMPUTERS].

¹⁵⁷ *Minpeco, S.A. v. Conticommodity Serv., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (quoting *Eastland*, 421 U.S. at 503).

¹⁵⁸ See *Rayburn*, 497 F.3d at 669-70 (Henderson, J., concurring) ("[T]he presence of FBI agents executing a search warrant in a Member's office necessarily disrupts his routine. . .").

Courts' preferences vary widely in their support for a particular means of search and seizure of electronic data, and currently "no single standard has emerged."¹⁵⁹ Aside from the use of filter teams, common investigatory procedures for reviewing potentially privileged electronic data include *in camera* review of all electronic data and the appointment of third party "special masters."¹⁶⁰ "Because a single computer can store millions of files, judges will undertake *in camera* review of computer files only rarely," making such a review of all electronic materials too burdensome for a case like Representative Jefferson's.¹⁶¹ However, the appointment of a "special master" is ideally suited for review of Speech or Debate Clause applicability. Although rarely utilized, "[a] neutral master . . . responsible to the court [can be appointed and charged with] examin[ing] all the [electronic] documents [in order to] determine what is privileged."¹⁶² Even though special masters can take years to complete their review,¹⁶³ their neutral nature is the best moderator of the important separation of powers issues inherent in a Speech or Debate Clause case. Many prosecutions of public officials already take years to reach trial,¹⁶⁴ and the speed of a special master's review may be aided

¹⁵⁹ SEARCHING AND SEIZING COMPUTERS, *supra* note 156, at § II.B.7.b.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² FEDERAL GUIDELINES FOR SEARCHING AND SEIZING COMPUTERS, *supra* note 154, at § IV.E.3.

¹⁶³ SEARCHING AND SEIZING COMPUTERS, *supra* note 156, at § II.B.7.b.

¹⁶⁴ For example, Tom Delay is still awaiting trial on some charges stemming from activities related to the 2002 election cycle, with no date currently set. Posting of Vince Liebowitz, *Earle Will Try Delay On Remaining Charges*, Capitol Annex, <http://capitolannex.com/2007/09/28/earle-will-try-delay-on-remaining-charges/> (Sept. 28, 2007, 10:10 EST).

by the appointment of a similarly neutral technical assistant.¹⁶⁵ Future investigations of sitting legislators should thus utilize a special master for the review of electronic data so that agents of the executive are not in extended possession of privileged material while electronic data is being searched.

Finally, implementing *in camera* judicial review for all potentially privileged materials and shielding prosecutors from all privileged materials are necessary safeguards that should be followed in future investigations. As previously mentioned, *in camera* review of privilege claims is essential to combating government corruption, as neither side should have complete control of information in a white-collar context.¹⁶⁶ There is precedent that shielding the prosecutor from privileged information is valid regardless of the other investigatory procedures used to obtain privileged materials. Although the *Rayburn* majority held that its decision does not apply in the Speech or Debate Clause context, the Supreme Court, in *Weatherford v. Bursey*,¹⁶⁷ distinguished between receiving privileged information from an executive agent and receiving information from a prosecution team in a Sixth Amendment civil rights violation.¹⁶⁸

B. Alternative Solutions

While the procedural safeguards and investigatory filtering procedures described above are capable of providing worthwhile def-

¹⁶⁵ FEDERAL GUIDELINES FOR SEARCHING AND SEIZING COMPUTERS *supra* note 154, at § IV.E.3.

¹⁶⁶ See Ermann, *supra* note 81, at 71-72.

¹⁶⁷ 429 U.S. 545 (1977).

¹⁶⁸ *Rayburn*, 497 F.3d at 662 (citing *Weatherford*, 429 U.S. at 558).

erence toward legislators' Speech or Debate Clause privileges in the context of a criminal investigation, additional solutions and approaches are available. While the options discussed below may be able to stand on their own as a policy approach, they are best conceptualized as supplemental to the solutions discussed earlier in this section.

1. "Use" Immunity Grants

Historically, immunity statutes in the United States have conferred one of two types of immunity. The first type, transactional immunity, "grant[s] immunity from prosecution for offenses to which compelled testimony relates,"¹⁶⁹ but was largely abandoned in 1970 when the National Commission on Reform of Federal Criminal Laws found that the immunity statutes in place conferred a greater benefit to those compelled to testify than was necessary under the Constitution.¹⁷⁰ The immunity statutes enacted since 1970 generally confer "use" or "derivative use" immunity, which offers "immunity from the use of compelled testimony and evidence derived [directly and indirectly] therefrom."¹⁷¹

In the context of the Speech or Debate Clause testimonial privilege, legislators subject to a raid by the executive could be granted use immunity pertaining to any privileged material uncovered during investigation.¹⁷² As witness immunity is granted to those who

¹⁶⁹ *Kastigar*, 406 U.S. at 443.

¹⁷⁰ *See id.* at 452-53 n.36 (describing the transition from a preference for transactional immunity to one for use immunity).

¹⁷¹ *Id.* at 452-53.

¹⁷² Although current procedure involves no specific immunity grant, evidentiary conse-

have evidence to offer against others under investigation, Speech or Debate Clause immunity could be granted as to privileged materials in a legislative office in order to obtain the nonprivileged material in that office for use in prosecution. Consistent with the definition above, such a grant would prohibit prosecutors from relying on any privileged items uncovered in the investigation in any future prosecution. Moreover, they could not rely on any nonprivileged evidence derived from privileged materials discovered in the investigation. As mentioned in previous sections, the enforcement of these protections is best accomplished through a burden-shifting mechanism that requires prosecutors to affirmatively show they are not relying on tainted evidence in any future prosecution.¹⁷³

While the incorporation of a burden-shifting mechanism into Speech and Debate Clause jurisprudence would be a worthwhile protection for legislators in the context of future prosecutions, the utility of a specific use immunity grant in this context is limited. This is due mainly to the fact that the Speech or Debate Clause is aimed at broader interests than simply shielding legislators from harassing criminal prosecutions. Rather, the clause seeks to protect an independent legislature¹⁷⁴ and the integrity of the legislative process.¹⁷⁵

quences of some common law developments in Speech or Debate Clause jurisprudence are similar to those granted from statutory immunity. *See, e.g., Rayburn*, 497 F.3d at 673 n.13 (Henderson, J., concurring) (“At trial Rep. Jefferson may assert Speech or Debate Clause immunity to bar the use of records he claims are privileged.”); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2006) (“When the Clause does not preclude suit altogether . . . [it] may preclude some relevant evidence.”).

¹⁷³ *See supra* text accompanying notes 120-21.

¹⁷⁴ *See Eastland*, 421 U.S. at 502 (“The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.”).

¹⁷⁵ *See Brewster*, 408 U.S. at 507 (“The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of

In this sense, the clause is arguably offended by the mere revelation of privileged information to another branch of government, regardless of whether or not a future prosecution flows from such a transmission.¹⁷⁶ Thus, a grant of immunity can only offer a limited amount of protection under the clause. Moreover, one understanding of the Speech or Debate Clause, as advanced by the Third Circuit, is that the clause already grants use immunity:

Unlike privileges such as attorney-client, physician-patient, or priest-penitent, the purpose of which is to prevent disclosures which would tend to inhibit the development of socially desirable confidential relationships, the Speech or Debate privilege is at its core a use privilege. The constitution clothes the legislator with a use immunity, analogous in many ways to the use immunity conferred upon witnesses.¹⁷⁷

Nonetheless, specific grants of immunity could still serve a procedural purpose, expediting the burden-shifting mechanisms in any future prosecutions.

2. *The Appointment of Independent Counsel and Investigators*

The new era of government corruption ushered in during the Watergate scandal changed the way public figures are investigated in numerous ways. Perhaps the most publicized change came in the

Congress, but to protect the integrity of the legislative process.”).

¹⁷⁶ This was the view taken by the *Rayburn* majority, which held that “exchanges between a Member of Congress and the Member’s staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity.” *Rayburn*, 497 F.3d at 661.

¹⁷⁷ *In re Grand Jury*, 587 F.2d at 596 (internal citations omitted).

form of the Independent Counsel Act, which called for judicially appointed prosecutors “in cases involving high government officials where the ‘personal, financial, or political conflict of interest’ is too great.”¹⁷⁸ From its inception in 1978 to its 1999 expiration, twenty-one special investigations were pursued under the Act at a cost of \$166 million.¹⁷⁹ Today, the appointment of these “Special Counsel” units is governed by 28 C.F.R. § 600. Section 600.1 provides that the Attorney General will appoint a special counsel for a criminal investigation when the investigation would present a conflict of interest with the DOJ or United States Attorney’s Office or otherwise constitute “extraordinary circumstances,” and it “would be in the public interest to appoint outside [counsel].”¹⁸⁰

Similar accommodations can be made for the investigation of sitting legislators. Appointing Special Counsel to prosecute sitting legislators may even be accommodated under the current regulations. The prosecution of sitting legislators arguably satisfies the “extraordinary circumstances” language above, and effectively prosecuting government corruption is certainly in the public interest.¹⁸¹ However, the use of special counsel as prosecutors only partially satisfies the concerns the Speech or Debate Clause seeks to protect. If executive agents are exposed to privileged materials during the investigation phase, the clause is still offended regardless of the prosecutor’s identity at trial.

¹⁷⁸ *From Watergate to Whitewater: History of the Independent Counsel*, CNN.COM, June 30, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/06/30/ic.history/>.

¹⁷⁹ *Id.*

¹⁸⁰ 28 C.F.R. § 600.1 (2008).

¹⁸¹ See *supra* Part II.B.1.

Thus, provisions allowing neutral Special Investigators should accompany any implementation of a Special Counsel regulation aimed at prosecuting those legislators protected by the Speech or Debate Clause. This allows the executive branch to be completely shielded from involvement in the investigation as well as the trial, comporting with the clause's goal of legislative independence. However, even this approach leaves numerous questions. Given the hefty budget necessary for just twenty-one investigations under the Independent Counsel Act, could the public interest justify the added costs of independent investigators as well? Even if executive agents are not exposed to privileged material, could the simple act of appointing a special prosecutor and investigators run afoul of the Speech or Debate Clause because the executive is still ultimately responsible for initiating a time-consuming investigation that will surely distract congressmen from their legislative duties?

IV. CONCLUSION

In 1973, Michael Walzer proposed the problem of "dirty hands," which argued that a "central feature of political life" is the fact that there exists a ready population of those who are willing "to hustle and lie for power and glory," entrenching such negative actions in the rules of the political game such that all those who are politically successful are "necessarily hustlers and liars."¹⁸² Even if a moderate version of this thesis is true, the amount of corruption in a government the size of the United States system, influenced to an

¹⁸² Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 161-63 (1973).

ever-increasing degree by special interests, is surely staggering. In *Brewster*, the Supreme Court noted that the Speech or Debate Clause “must be interpreted in light of the American experience.”¹⁸³ If such a statement still holds true today, the clause should be interpreted in light of the unprecedented levels of corruption seen in the federal government over the past four decades.

The public interest in combating this corruption is certainly substantial. The viability of any democracy rests in its people, and nothing demolishes their faith and trust in government more fully than crime and corruption among its principals. Thus, while the privileges granted to our elected officials as necessary to fulfill their duties must be respected, they should not grant subjects of a validly executed criminal investigation carte-blanc control over the only information that can convict them. Despite the fact that other constitutional privileges accommodate the interests of law enforcement long before passing this point-of-no-return, the District of Columbia Circuit’s ruling in *Rayburn* ensures that Speech or Debate Clause privilege does not.

Therefore, the broad definition the *Rayburn* Court gave the term “questioning” under the clause should be narrowed to no longer encompass the execution of a valid search warrant. Rather, Judge Henderson’s approach in her *Rayburn* concurrence should prevail; the holdings of *Gravel* and *Brewster* should be affirmed such that it is clear that legislators are not exempt from criminal process under the Speech or Debate Clause. Were the clause’s scope rolled back in this

¹⁸³ *Brewster*, 408 U.S. at 508.

manner, procedural safeguards and investigative filtering procedures can still be implemented to protect the rights of legislators and the balance of powers between branches. By drawing procedural elements from the treatment of other constitutional privileges, implementing widely accepted investigatory filtering procedures designed to safeguard privileged materials whenever possible, and utilizing use immunity grants and independent investigators when necessary, it is possible to strike a more appropriate balance between legislators' Speech or Debate Clause rights and the interest in combating government corruption.